

ENTERED

December 07, 2016

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**JOEL MELO-CEDANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.§
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§Civil Action No. 1:16-cv-256
(Criminal No. 1:15-cr-741-1)**ORDER ADOPTING MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION**

Before the Court is the Magistrate Judge's Report and Recommendation (hereafter "R&R") (Docket No. 7) in the above-referenced cause of action, recommending that Petitioner's "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" (hereafter "§ 2255 motion") be dismissed without prejudice because his appeal in *United States v. Melo-Cedano*, Case No. 1:15-cr-741-1, remains pending.

On December 1, 2016, Petitioner filed his objections to the R&R, arguing that he never consented to have the Magistrate Judge rule on his § 2255 motion, and that he specifically requested the withdrawal of any direct appeal. Docket No. 10 at 1–2. Petitioner requests that his § 2255 motion be reassigned to a U.S. District Judge and proceed without the pending direct appeal.

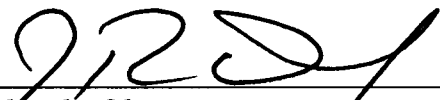
With regard to Petitioner's first objection, no Magistrate Judge has ruled on Petitioner's § 2255 motion. The "Report and Recommendation" issued by the Magistrate Judge is just that—a recommendation to the U.S. District Court, which then makes an independent ruling on the pending motion.

As for Petitioner's second objection, a review of the docket for the Court of Appeals for the Fifth Circuit shows that Petitioner's direct appeal remains pending. *See* Case No. 16-40589. Although Petitioner is entitled to withdraw his direct appeal if he so chooses, no such withdrawal has occurred as of the date of this

Order. Accordingly, Petitioner's § 2255 motion is premature. Additionally, as correctly noted by the Magistrate Judge, Petitioner presents no extraordinary circumstances mandating immediate review of his § 2255 motion. Docket No. 7 at 4-5.

It is therefore **ORDERED, ADJUDGED, and DECREED** that Melo-Cedano's § 2255 motion is **DISMISSED** without prejudice to refile after resolution of his direct appeal. A certificate of appealability shall not issue.

Signed on this 6th day of December, 2016



Rolando Olvera
United States District Judge